84-1848 (1)

NO.:_____

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CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DWAYNE JONATHAN HILJER, as personal representative of the Estate of MARY GREGG HILJER, deceased,
Appellant

v.

HARRY N. WALTERS, Administrator of Veterans Afairs,
Appellee

PETITION FOR CERTIORARI

FRANK M. BOSWORTH, JR. P.A.
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1518 Winfield Road West,
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DAVID V. SEAMAN, Attorney, Civil Div.,
Dept. of Justice, Washsinton, D.C. 20530

Attorney for Defendant-Appellee

(REPRINT)

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v.

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Appellee

PETITION FOR CERTIORARI
from United States Court of Appeals, Eleventh Circuit on Appeal from U.S. District Court, Middle District of Florida.

(a) QUESTIONS PRESENTED FOR REVIEW

First Question: Is a procedure of the Administrator of Veterans Affairs unconstitutional which permits an employee of the administrator of Veterans Affairs,

by Administrative Decree to modify Death Pension rights to a veteran's widow, although the pension is authorized by a Statute of the United States (38 U.S.C. 3010 d, formerly c) and Approved by the Board of Veterans Appeals?

The question as applied specifically to this case is:

Was the procedure of the VA a violation of the FIFTH AMENDMENT to the CONSTITUTION OF THE UNITED STATES in making an Administrative Decree in 1974 declaring the effective date of the widow's pension to be 1972 despite the following facts?

(a) The veteran was killed in action in August 1944.

(b) The widow's claim was filed in 1945.

(c) The Board of Veterans Appeals ruled in 1952 that the widow was not entitled to any benefits.

(d) The Board of Veterans Appeals reversed itself 1974 and ruled the widow was entitled to all benefits.

(e) The Statute (38 U.S.C. 3010 d) provides in pertinent part, "the effective date of an award of death compensation or death pension, where the application is received within one year from the date of death, shall be the first day of the month in which the death occured", and

(f) The applicable VA Regulation (38 C.F.R. 3.015 a) provides in pertinent part that the reversal in 1974 "has the same effect as if the corrected decision had been made on the date of the reversed

decision", which was in 1952.

Second Question: Would not the Finality Statute, 38 U.S.C. 211 (a), if interpreted to prohibit the Courts of the United States from exercising the right to render a Declaratory Judgment pursuant to 28 U.S.C. 2201 as to the meaning and/or application of a law of the United States or Federal Regulation, render the Finality Statute unconstitutional voilative of the Due Process Clause?

Applying the preceding question to this case, the question is: If Mary Hiljer was deprived of some of her Death Pension payments by the Administrative Decree by the Administrator's assistant overruling the decision of the Board of Veterans Appeals, and contrary to the

specific provisions of 38 U.S.C. 3010 (d0 and 38 C.F.R. 3.105 (a), is not the purpose of the Declaratory Judgment Statute (28 U.S.C. 2201) defeated by the Court's failure to provide guidance otherwise unavailable to the Administrator of Veterans Affairs?

(b) PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, the grandchildren of the deceased veteran and his widow, have a vital interest in the outcome of this proceeding.

(c and d) TABLE OF CONTENTS and reference to reports and opinions - see frontispiece.

(e) STATEMENT OF GROUNDS ON WHICH JURISDICTION OF COURT IS BASED.

(i) This case was brought in the

United States District Court for the Middle District of Florida, Tampa Division pursuant to 28 U.S.C. 2201 for the purpose of determining a question of actual controversy between Mary Gregg Hiljer, who died during the course of the litigation, and the Administrator of Veterans Affairs. The statutory basis for federal jurisdiction alleged in the complaint was Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 701 et seq.; 28 U.S.C. 1331; Freedom of Information Act 5 U.S.C. 522; Declaratory Judgment Act 28 U.S.C. 2201 et seq., Rule 57; the All Writs Act, 28 U.S.C. 1651; and 18 U.S.C. 1905.

(ii) Judgment was rendered in the District Court on January 18, 1984 and

entered on January 19, 1984 (appendix xiv-xvii). The United States Court of Appeals, Eleventh Circuit affirmed the District Court Judgment on January 10, 1985, and denied appellant's petition for rehearing on Feb. 11, 1985. (appdx. xxvii-xxviii)

(iii) This appeal is taken pursuant to 28 U.S.C., Chapter 81.

(f) CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED:

1. The Fifth Amendment to the Constitution of the United States provides, in Pertinent part:

U. S. CONSTITUTION, Amendment V:

> ***nor shall any person***be deprived of life, liberty or property, without due process of law***.

2. Statutes:

Public Law 85-857 - Sept. 2, 1958
(Now 38 & S.C. 3010 (d))

Section 3010 (d): Effective dates of awards, in pertinent part:

* * *

> (c) The effective date of an award of death compensation....or death pension shall be the day after the date of death if application therefor is received within one year from such date of death.

The present law, as amended in 1962 and in 1970 changes subsection (c) to subsection (d) and changes the effective date to "the first day of the month in which the death occured".

The Declaratory Judgment Act, 28 U.S.C. 2201 in pertinent part:

> (a) In a case of actual controversary within its jurisdiction***any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought***

The VA Finality Statute 38 U.S.C. 211 (a), inpertinent part provides:

> ***the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration....shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the

nature of mandamus or otherwise***

Code of Federal Regulations 38 C.F.R. 3.105 (a) - For the purpose of authorizing benefits***a reversal of a prior decision***has the same effect as if the corrected decision had been made on the date of the reversed decision***

(g) STATEMENT OF THE CASE AND ISSUES RAISED.

Carl J. Hiljer was killed in action in the European Theater of World War II on August 14, 1944. His widow (the original plaintiff herein) filed for a widow's pension in 1945. Her claim was originally denied by the Board of Veterans Appeals on March 6, 1952 (appendix i - xi). The Board of Veterans Appeals reversed its 1952 decision on February 5, 1974 and in so doing, in addition to finding that Mary was married to the veteran until his death in 1944 and that she had never remarried, ruled

that, "The appellant may be recognized as the widow of the veteran for Veterans Administration purposes, accordingly the appeal is allowed" (appendix xi). The local VA office, upon remand by the BVA, then administratively decreed (appendix xix) that these death benefits would commence July 10, 1972. Mary then asserted through counsel that the benefits should be commenced as of August, 1944 as provided by 38 U.S.C. 3010 (d) formerly (c), and 38 C.F.R. 3.105 (a). Upon refusal by the VA Mary commenced the action in the U.S. District court, Middle District of Florida for a Declaratory Judgment, and counsel for the plaintiff and the U.S. Attorney, agreeing that there was no dispute as to the facts brought on Cross Motions (appendix xii & xvi) before the District Court, hoping

to resolve the dispute before challenging the VA. The District Court refused to render a Declaratory Judgment (appendix xx-xxiv) as to the meaning of 38 U.S.C. 3010 (d) as to the effective Date of Death Awards, on the ground that the Finality Statute 38 U.S.C. 211 (a), barred the Court from so doing. Appeal was then taken to the U. S. Court of Appeals, Eleventh Circuit (appendix xxv) where appellant raised the issue that the Finality Statute was never intended to interfere with the right of the Federal Courts under 28 U.S.C. 2201 to aid and assist procedurally before or during pending litigation. (see 26 C. J. S. 64 et seq. and Notes of Advisory Committee on Rules under Rule 57).

The Court of Appeals, Eleventh

Circuit, in its decision (Hiljer v. Walters, this case: 749 F2d 1553 (appendix xxviii) suggested it might recognize a challenge to VA procedure, but could not do so because in so doing would "subsume section 211 (a)". The word subsume was used by the U.S. Court of Appeals in its decision.

(j) REASONS FOR ALLOWANCE OF WRIT.

It is of imperative public importance that the District Courts and Courts of Appeal understand that the Declaratory Judgment Statute is a procedural aid designed to reduce litigation as it could have done here if the District Court had Declared as a Matter of Law what the effect of the ruling of the Board of Veterans Appeals was. Now it will be necessary (if the District Court and the Court of

Appeals are not corrected) for the appellant to go once again to the Board of Veterans Appeals to correct the obvious error of one of the VA's subordinate employees. We assume that if the District Court or Court of Appeals had declared the meaning and the effect, under the Law and Regulations, of the Board of Veterans Appeals' decision, that further confrontation with the Administrator of Veterans Affairs will be unnecessary.

Many lower Courts have taken shelter under cover of the Finality Statute, which was also designed to prevent excessive litigation. However, by saying as the Court of Appeals has, that one Statute, if used, would subsume the other is a

nonsequitur because both statutes were intended to reduce litigation. Both the District Court and the Court of Appeals also relied on De Sibonga v. Administrator of Veterans Affairs, 458 F.2d 789 (D.C. Cir. 1972) which, to this writer, is obviously not similar either in facts, law or the relief sought. That case involved an application for a retroactive award under different sections of 38 U.S.C. and 38 C.F.R. and was grounded on a "Difference of Opinion" within the VA. It was not an action for a Declaratory Judgment, nor did it involve any other issue that might be considered similar to this case. In the case at hand the District Court was not required to give mandamus or injunctive relief, but appellant submits the Courts

below incorrectly concluded that the Finality Statute barred the District Court or the U.S. Court of Appeals from declaring the legal effect of the Final Decision of the Board of Veterans Appeals (appendix xi).

No review is sought of the Ruling or Final Finding of the Board of Veterans Appeals. Appellant accepts the Findings of the Board, but does not believe that a subaltern of the Administrator of Veterans Affairs in the performance of the duties of his office can arbitrarily, intentionally or not, disregard both the Law of the Land and Mandates of the highest tribunal of the VA.

IT IS NOT IN THE PUBLIC INTEREST THAT 38 U.S.C. 211 (a) BE INTERPRETED BY

THE COURTS IN SUCH A WAY AS TO PROTECT ERRORS OF GOVERNMENT AGENCY EMPLOYEES WHETHER THROUGH MALFEASANCE OR MISFEASANCE.

Johnson v. Robison, 94 S.Ct. 1160 (19740 contains a discussion supporting appellant's contention that 38 U.S.C. 211 (a) does not and was not intended to restrict the rights of courts to aid in the prevention and/or correction of arbitrary or unlawful action by a public official or employee which deprives another person of his property in violation of the Fifth Amendment to the Constitution of the United States.

As long as our adversary system of law exists and the Attorney General of the United States persists in the philosophy that it is his duty to support all actions

and decisions of Federal Agency employees, right or wrong, any interpretation of a statute that prevents our Courts from assisting in the correction of injustices must also be rejected.

CONCLUSION

AS SUGGESTED BY SUPREME COURT RULE 17, APPELLANT RECOMMENDS THAT THIS COURT EXERCISE ITS POWER OF SUPERVISION TO PREVENT FURTHER MISUSE AND/OR NON-USE OF THE DECLARATORY JUDGMENT STATUTE.

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APPENDIX

BOARD OF VETERANS APPEALS

Washington, D. C. 20420

IN THE APPEAL OF	FINDINGS AND DECISION
HARRY G. HILJER	
	DATE: Feb. 25, 1974
IN THE CASE OF	
CARL J. HILJER XC 3 697 689	Docket No. 74-02 0636

THE ISSUE

Whether the appellant may be recognized as the widow of the veteran for Veterans Administration purposes.

REPRESENTATION

Appellant represented by: Lewis H. Hill III, Attorney

WITNESSES AT HEARING ON APPEAL

Mary G. Hiljer, appellant, Regina Bole and Frank Bole

CONSULTATIONS BY THE BOARD

H. Clayton Adams, Staff Legal Adviser

EXHIBIT "A"

ACTIONS LEADING TO PRESENT APPELLATE STATUS

In connection with a claim for death compensation, the Board of Veterans Appeals, in a decision of March 1952, held, in substance, that the appellant was not shown to be the widow of the veteran for Veterans Administration purposes. Additional evidence has been presented, and the case is now before the Board on an appeal from recent denial of the appellant's claim.

CONTENTIONS

It is contended by the appellant, and on her behalf by her attorney, that she filed for divorce from the veteran because of physical abuse which she took from him but that there was a subsequent reconciliation with resumption of cohabitation which continued to the extent compatible with his status as a soldier until his death in August, 1944. It is contended that the evidence now of record, including recent testimony of friends and associates of the veteran and the appellant, establishes resusmption of the marital relationship. Particular attention is called to the requirement that reasonable doubt be resolved in favor of the appellant.

THE EVIDENCE

The veteran had active service from February 1944 until he was killed in action on August 14, 1944. At the time of entrance into service, he named his wife, the appellant, as principal beneficiary of his National Service Life Insurance with his son, Dwayne Hiljer, as the contingent beneficiary.

The veteran and the appellant, Mary L. Gregg, were married in February 1937 in Alexandria, Virginia. A son was born to them later in that year in the District of Columbia. They subsequently moved to Detroit, Michigan where his family resided, and a bill of complaint for divorce was filed by the appellant against the veteran in February 1943. The court did not enter final action on the complaint because of his subsequent entrance into service.

There are letters of record from the veteran to the appellant covering the period from February 1944 to June 1944 in which he addressed her variously as "Dear Mary," "Dearest Mary," and "Dearest Wife." There are references in these letters to her failure to write to him often, but it is also shown that she sent him money on occasion. In the last of this series of letters, he stated that he expected to be home on June 24 for 10 days.

On July 6, 1944, at Fort George G. Meade, Maryland, prior to going overseas, the veteran executed a change of beneficiary of his National Service Life Insurance, naming his son Dwayne as the principal beneficiary, and his sister, Mary E. Hiljer as the contingent beneficiary. Dwayne's address was shown as that of his mother, but the veteran's home address was shown as that of his sister and other members of his family.

Also of record are letters written to the appellant by the veteran from July 13, 1944, to August 10, 1944, four days before his death. He addressed her as "Dearest Mary," "Hi Doll," and, in the last letter, as "Dearest Wife." He stated that upon his return, he was "going to spend the rest of my life making you happy."

An affidavit, dated in July 1947, of Markus S. Simon, the attorney who represented the veteran in her divorce action, is of record in which he stated that, on or about July 5, 1944, he was informed by his client that she had become reconciled with the veteran and resumed marital relationships with him and that it had been agreed that the divorce case should be dismissed.

Beginning in July 1947, in connection with the appellant's claim for widow's benefits, various interviews and other investigations were completed. Motion was then pending to obtain dismissal of the bill of complaint for divorce "Nunc Pro Tunc."

An affidavit and interviews with the appellant, including her deposition, elicited information to the combined effect that the appellant and the veteran had lived together as husband and wife from January 1944 until his entrance into service, that she received a full allotment for herself and her son, and that they had lived together as husband and wife when he came home on furlough in the latter part of June 1944, finding it necessary because she shared an apartment with her mother and two other girls to spend their nights together in motels and tourist courts. She also stated that the change of beneficiary of the veteran's life insurance had been discussed and agreed between herself and her husband.

Interviews were conducted with relatives of the veteran and their neighbors some of whom gave depositions and some of whom would not, and their statements were to the effect that to their knowledge no reconciliation had been accomplished between the veteran and the appellant during his furlough despite his efforts to effect such a reconciliation.

These statements were substantialaly to the effect that he spent his time on furlough at the home of his mother and not with the appellant and that he had indicated that he was unable to gain access to her apartment to stay. The mother of the appellant, on the other hand, stated that she had lived with the appellant in Detroit for 14 months, which included the time just prior to the veteran's entrance into service and the time that he was on furlough before going overseas. She stated that during this time, prior to his going into service and while on furlough, he and the appellant had spent time together in the apartment and had gone off together, not returning until the next day.

It was subsequently established that the appellant was the beneficiary of a life insurance policy on the life of Mr. Hiljer at the time of his death and that he had listed her on the policy as his wife since April 1941.

The above was substantially the state of the evidence at the time of the decision of the Board in March 1952, referred to above. The evidence at that time did not indicate whether the motion for dismissal of the divorce proceeding, Nunc Pro Tunc, was ever granted.

In December 1969, a statement was submitted from the office of the clerk of the court having jurisdiction of the divorce proceeding, showing that the case was dismissed in April 1948.

In August 1971, a request was received from the Honorable Lawton Chiles, United States Senate, for further review of the appellant's claim. A formal claim for further consideration was subsequently received from her attorney.

Affidavits, all dated in 1972, were subsequently submitted of the appelant, Frank Bole, Regina Bole, his wife, and Thomas C. Wayde. Thomas Wayde related his long association with the veteran, going back to high school, and stated that he considered himself a close friend of Carl and his family. He related the marital conflicts of Carl and Mary, to the fact that they had lived with his family for a time in Detroit and expressed the opinion that the conflicts had been resolved and that their marital relationship had been resumed.

The affidavit of Frank and Regina Bole was to the effect that prior to Carl's going into service he and Mary had resolved their domestic difficulties. While Carl was in service, Mary had worked in a war job and her mother had come from North Carolina to take care of their son. She also shared an apartment with two young girls and, therefore, while Carl was on leave, he stayed with his family a few blocks away and he and Mary had also stayed with them (the Boles) spending several nights in the living room, or at a local hotel. They stated that they knew that at the time Carl had gone overseas the marital relationship had been resumed and that he and Mary were living together as man and wife with theirdomestic difficulties behind them.

In November 1973, a copy was submited of the bill of complaint for divorce filed by the appellant against the veteran in 1943. Allegations included drunkenness and abusiveness on his part as well as nonsupport.

In January 1974, a hearing was held at which the appellant appeared with her representative and testified, advancing and elaborating upon the contentions set forth above and previously set forth in her affidavit, referred to above. A transcript of the hearing is of record and has been reviewed by the Board. She recounted the circumstances of her marriage to the veteran, following which they went to Detroit and resided for approximately four years in the home of his mother. She stated that she had been treated badly by her in laws and had subsequently left the home with her son and gone to live with Mr. and Mrs. Bole. Thereafter, Carl had obtained an apartment, to which they subsequently moved. She described the conditions supporting her bill for divorce. She further stated that they had agreed to reconcile in January 1944, prior to his going into service, and that they had cohabitated at this time and during his furlough in June and July 1944. She had then called the attorney and told him that the reconciliation was completed, and, as far as she was concerned, this ended the matter. She stated that she was apparently supposed to sign something but never got around to it because she was working 10 hours a night at a motorcar company.

Testimony was also taken from Frank and Regina Bole which was substantially to the same effect as their affidavit, summarized above.

THE LAW AND REGULATIONS

The Term "widow" means a woman who was the wife of the veteran at the time of his death, and who lived with him continuously from the date of marriage to the date of death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of his wife) and who has not remarried. (33 U.S.C. 101(3); 38 C.F.R. 3.50)

The requirement that there must be continuous cohabitation from the date of marriage to the date of death of the veteran will be considered as having been met when the evidence shows there was no separation due to the fault of the widow. Temporary separations which ordinarily occur, including those caused for the time being through fault of either party, will not break the continuity of the cohabitation. (38 C.F.R. 3.53(A)).

DISCUSSION AND EVALUATION

The appellant's claim to the status of "widow" for Veterans Administration purposes has been previously considered by the Board, and upon the evidence of record at that time, the claim was denied. This does not, however, prevent the further consideration of the claim upon the basis of new and material evidence which must, of course, be considered in association with the evidence previously of record.

There is no evidence of any marriage of the appellant subsequent to the veteran's death.

Carl was married to the appellant in 1937 and they had one son. Thereafter, for reasons not clear from the record but alleged to have been due to cruelty on his part, a divorce was sought in February 1943. The divorce was never granted and it has subsequently, in 1969, been determined that the case was dismissed in 1948, after the death of the veteran.

The question to be resolved, therefore, remains one of whether there was continuous cohabitation during the period of the marraige of the veteran and the appellant, it being provided that temporary separations through the fault of either party will not break the continuity of cohabitation.

The contentions of the appellant with regard to a reconciliation in 1944, prior to the veteran's entrance into service, and their cohabitation while he was on furlough in June and July 1944, have gained support from the testimony of mutual friends who are presumably disinterested parties. The earlier evidence, while not supporting a finding of reconciliation or continued cohabitation, to the extent that it was based upon first hand knowledge, cannot be said to be entirely unaffected by the interest, of one kind or another, of the various informants.

The gist of the additional evidence recently submitted in the form of sworn testimony gains support from the letters of the veteran to his wife which indicate no intention other than the continuance of the marital relationship.

The Board is not called upon to make a judgment as to all the conflicts in the evidence or as to the relative fault of the parties in their marital difficulties. On the basis of the current record, particularly with resolution of reasonable doubt in favor of the appellant as required by the controlling regulations, it is concluded that the appellant, Mary G. Hiljer, may be considered the legal wife of the veteran and his widow for Veterans Administration purposes.

FINDINGS OF FACT

1. The appellant was married to the veteran from 1937 until his death in 1944.

2. She has not since remarried.

3. Although there was a separation during the marriage, a reconciliation had occurred prior to the veteran's death.

CONCLUSION OF LAW

The appellant, except for temporary separation, lived continuously with the veteran from the date of their marriage to the date of his death. (38 U.S.C. 101(3);38 C.F.R. 3.50, 3.53(A))

DECISION

The appellant may be recognized as the widow of the veteran for Veterans Administration purposes. Accordingly, the appeal is allowed.

Elizabeth F. Parris /s/
ELIZABETH F. PARRIS

D. T. Landers /s/
D. T. LANDERS

D. M. Callison /s/
D. M. CALLISON

DWAYNE JONATHAN HILJER, as
Personal Representative of
the Estate of Mary Gregg
Hiljer, deceased.

Plaintiff

Case No. 82-77-Civ-T-BK

vs.

ROBERT NIMMO, Administrator
of Veterans Affairs.

Defendant

_____/

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court as follows:

That the Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

This motion is based upon:

(a) Complaint and Answer
(b) Copy of Veterans Administration File (original file in possession of U. S. Attorney, attorney for defendant)

(c) Affidavit of Frank M. Bosworth, Jr. attorney for plaintiff.
(d) Memorandum in suppport of Motion of plaintiff.

FRANK M. BOSWORTH, JR. P.A.

BY: Frank M. Bosworth, Jr. /s/
Frank M. Bosworth, Jr.
Attorney for Plaintiff
1518 Winfield Road West
Clearwater, Florida 33516
Tel: (813) 442-6346

Dated: February 23, 1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, except a copy of the Veterans Administration File, (the original of which is now in the possession of Defendant's attorney) has been furnished by U.S. mail to the U. S. Attorney, attorney for the Defendant at 500 Zack Street, Suite 410, Tampa, Florida 33602.

Frank M. Bosworth, Jr./s/
Frank M. Bosworth, Jr.
Attorney for Plaintiff

DWAYNE JONATHAN HILJER, as Personal Representative of the Estate of Mary Gregg Hiljer, deceased.

Plaintiff

Case No. 82-77-Civ-T-BK

vs.

ROBERT NIMMO, Administrator of Veterans Affairs.

Defendant

_____/

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF PINELLAS

Frank M. Bosworth, Jr. being duly sworn deposes and says:

1. I am the attorney for the Plaintiff herein.

2. Attorneys for both Plaintiff and Defendant are of the belief that there are no issues of fact to be tried in this matter, since all facts are undisputed and are contained in the Veterans Administration File which has been produced by the Defendant and is now in the possession of the U. S. Attorney, attorney for the Defendant.

3. Attorneys for the Plaintiff and Defendant have agreed to submit the matter alleged in the complaint to the Court for final judgment by cross-motions for Summary Judgment.

Frank M. Bosworth, Jr. /s/

Frank M. Bosworth, Jr.

Sworn to before me this
3rd day of February, 1983

Illegible /s/
Notary Public State of Florida at Large
My Commission Expires July 17, 1984

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DWAYNE JONATHAN HILJER, as Personal Representative of the Estate of Mary Gregg Hiljer, Deceased,

Plaintiff,

v.

ROBERT NIMMO, Administrator of Veterans Affairs,

Defendant.

: Case No. 82-77-Civ-T-BK

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT O
IN THE ALTERNATIVE, MOTION FOR JUDGMENT O
PLEADINGS

Comes now the defendant, ROBERT NIMMO, Administrator of Veterans Affairs, by and through his undersigned United States Attorney and moves the Court pursuant to Rule 56, Feder Rules of Civil Procedure, for summary judgment in his favor on the ground that there is no material dispute as to any material issue of fact and the plaintiff is entitled to judgment as a matter of law, or, in the alternative, fo judgment on the pleadings.

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MARY J. HILJER	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO.
	)	CIV-T-K
ROBERT NIMMO,	)	82-77
Administrator	)	
of Veterans Affairs	)	
	)	
Defendant	)	

AFFIDAVIT

CITY OF WASHINGTON	)	
	)	S.S.
DISTRICT OF COLUMBIA	)	

I, John H. Thompson, under penalty of perjury state as follows:

1. I am Acting Assistant General Counsel, Professional Staff Group II, Office of the General Counsel, Veterans Administration (VA). In my position I am responsible for providing legal counsel regarding various Veterans Administration benefits programs, including survivors' compensation benefits.

2. I have temporary custody of the Veterans Administration claims folder identifi by the name Carl J. Hiljer under claim number 3 697 689.

3. I have reviewed the claims folder and am familiar with its contents, which include a claims for Veterans Administration benefits, based upon the service of the late Mr. Hiljer, and documentation of the administrative disposition of all such claims.

4. In 1945, the plaintiff filed for dependency and indemnity compensation. On Apr 7, 1948, her claim was denied by the local VA regional office on the basis that she had not continuously cohabitated with Mr. Hiljer from the date of marriage until the date of death, required by 38 U.S.C. SS 410, 101(3).

5. On July 1, 1972, plaintiff again file a claim and in support submitted affidavit evidence and gave testimony at a VA personal hearing. The local VA office reaffirmed its prior denial.

On appeal, the Board of Veterans Appeals reversed, holding on February 25, 1974, that the plaintiff was the surviving spouse of Mr. Hiljer for purposess of the claimed VA death benefits. The local VA office, upon remand by the BVA, then administratively decreed that these death benefits would commence July 10, 1972, the date of the reopened claim, consistent with 38 U.S.C. S 3010(a). (The July 10, 1972 claim was a claim "reopened after final adjudication" because denial of the original claim in 1945 had not been timely appealed, hence it became final, per 38 U.S.C. S 4005(c)).

6. The file indicates that in April 1974, plaintiff was notified that death benefits were awarded effective July 10, 1972, "The date of receipt of your reopened claim, when you furnished evidence on which the decision was based."

I declare and state under penalty of perjury that the information set forth herein is true and correct.

John H. Thompson /s/

JOHN H. THOMPSON
Acting Assistant General Counsel

Executed on 2 April 1982.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DWAYNE JONATHAN HILJER,
as personal representative
of the estate of Mary Gregg
Hiljer, Deceased,

Plaintiff(s),

vs. CASE NO. 82-77-CIV-T-17

ROBERT NIMMO, Administrator
of Veterans Affairs,

Defendant(s).

_____/

ORDER

This cause is before the Court on motions for summary judgment filed by both Plaintiff and Defendant. Upon a review of the pleadings and exhibits in this matter and consideration of same, this Court has determined, pursuant to Rule 56 of the Federal Rules of Civil Procedure that consideration on party's motions is appropriate as there is no genuine issue as to any material fact.

The facts of this case take us back to the height of the Second World War when in August of 1944 an American serviceman named Carl J. Hiljer lost his life. His wife, the original Plaintiff

in this case, Mary G. Hiljer, filed for V. A. death benefits in October of 1945. Those benefits were denied because her paperwork was not timely filed. Apparently she was again denied in April of 1948 because the investigation into her marital relationship with the deceased, Carl J. Hiljer, indicated there was conflicting evidence as to whether she met the Veteran Administration's criteria for being the deceased's widow.

Mrs. Hiljer appealed her denial of claim to the Board of Veteran Appeals and on March 6, 1952 that Board upheld the denial of benefits to her. In December of 1969 Mrs. Hiljer again reopened her request for Veteran death benefits and was again denied. In July of 1972 this matter was again reopened at Plaintiff's request and new evidence and testimony was presented to the Board of Veteran Appeals from friends and acquaintances of Carl J. Hiljer. On February 5, 1974 the Board of Veteran Appeals reversed the previous decision of 1952 and allowed for benefits to be paid to Mrs. Hiljer as of the effective date of July 10, 1972 when she had reopened this case.

In January of 1982 Mrs. Hiljer filed for retroactive compensation seeking to be paid he benefits for the period from the month of her husband's death in 1944 to July 1972.

It is the Plaintiff's contention that as the Board of Veteran Appeals has determined Mr Hiljer was Carl J. Hiljer's widow and the Federal Statutes applicable to this matter in 1944 would give Plaintiff relief that she is therefore entitled to retroactive application benefits to 1944. To accomplish what Plaintif desires, the Court would have to review the March 6, 1952 decision of the Board of Veteran Appeals. Upon a review of the law, it is apparent to this Court that it has neither the jurisdiction nor the power to do as Plaintiff asks 38 U.S.C. S211(a).

According to the Effective Date Statute, the effective date of the award for death in this case was July 10, 1972 as that was the da this claim was reopened and new evidence was supplied for consideration.

DeSibonga v. Administrator of Veterans Affairs, 458 F.2d 789 (D.C. Cir) cert denied, 409 U.S. 952, reh. denied 409 U.S. 1068 (1972); 38 U.S.C. S3010(a). Plaintiff has not alleged that the contested determinations were predicated on clear and unmistakable error. Therefore, retroactive entitlement is denied. 38 C.F.R. S3.105(a).

Plaintiff's motion for summary judgment is denied. The Defendant's motion for summary judgment is granted and the Clerk is ordered to enter a judgment consistent herewith.

DONE and ORDERED in Chambers at Tampa, Florida this 18th day of January, 1984.

Elizabeth A. Kovachevich /s/

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
Frank Bosworth, Jr., Esq.
Gary Takacs, Asst. U.S. Atty.

JUDGMENT ON DECISION BY THE COURT
FOR THE
UNITED STATES DISTRICT COURT
Middle District of Florida

DWAYNE JONATHAN HILJER, as personal representative of the Estate of Mary Gregg Hiljer, Deceased	)	Civil Action Docket No. 82-77-Civ-T-17
vs.	)	
ROBERT NIMMO, ADMINISTRATOR Veterans Affairs	)	JUDGMENT

This action came on for trial (hearing before the court, United States District Judge (Magistrate) ELIZABETH A. KOVACHEVICH presidin The issues having been duly tried (heard) a decision having been duly rendered, it is ordered and adjudged.....that the Plainti take nothing and that this action be and is hereby dismissed.

Dated at:Tampa, Florida Date: January 19, 198

DONALD M. CINNAMOND,
Clerk of the Court
By:Mary Ann Perry /s/
Deputy Clerk

M'FILM Roll # ? 6
DOCUMENT #1207

UNITED STATES DISTRICT COURT
Middle District of Florida
TAMPA, FLORIDA

DWAYNE JONATHAN HILJER, as personal representative of the Estate of Mary Gregg Hiljer, Deceased Plaintiff vs. ROBERT NIMMO, ADMINISTRATOR Veterans Affairs Defendant	:	Civil Action Case No. 82-77-Civ-T-17

NOTICE OF APPEAL

Notice is hereby given that DWAYNE JONATHAN HILJER. AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY GREGG HILJER, DECEASED, Plaintiff above named, hereby appeals to the United States Court of Appeals from the order and judgment of Judge ELIZABETH A. KOVACHEVICH dated and entered in this action on January 18, 1984, and January 19, 1984.

FRANK M. BOSWORTH, JR., P.A.

By: Frank M. Bosworth,Jr. /s/
Attorney for
Plaintiff-Appellant
1518 Winfield Road West
Clearwater, FL 33516
Tel: (813) 442-6346

Dated: January 25, 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to GARY J. TAKACS, Esq. Assistant United States Attorney 500 Zack Street, Suite 410, Tampa, Florida 33602, on January 25, 1984.

Frank M. Bosworth, Jr. /s/

Frank M. Bosworth, Jr.
Attorney for Plaintiff

749 F2d 1553

HILJER v. WALTERS

Dwayne Jonathan HILJER, as personal representative of the Estate of Mary Gregg Hiljer, Deceased, Plaintiff-Appellant,

v.

Harry N. WALTERS, Administrator of Veterans Affairs, Defendant-Appellee.

No. 84-3085.

United States Court of Appeals
Eleventh Circuit.

Jan. 10, 1985.

On appeal from the United States District Court for the Middle District of Fllorida, Elizabeth A. Kovachevich, J., of case involving claim for veteran's benefits, the Court of Appeals held that federal court had no jurisdiction of claim due to operation of the Veteran's Administration finality statute.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, FAY, Circuit Judge, and PECK*, Senior Court Judge.

PER CURIAM:

(1,2) The federal courts have no jurisdiction this claim for veteran's benefits, which, with certain exceptions, are made judicially unreviewable by the VA Finality Statute, 38 U.S.C. S 211(a). Plaintiff seeks to escape th statute by contesting the Administrator's actions in only partially retroactively applyi a decision of the Veteran's Board of Appeals, alleging that he has a property interest in th benefits. Assuming without deciding that this court would recognize an exception for a constitutional challenge to VA procedures, compare Anderson v. VA, 559 F.2d 935, 936 (5th Cir. 1977), and Johnson v. Robison, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the challenge in this instance is unavailing. The alleged property interest in the benefits woul make every decision denying benefits judicially reviewable and would subsume S 211(a). See De Sibonga v. Administrator of Veterans Affairs, 458 F.2d 789 (D.C.Cir.1972).

AFFIRMED.

*Honorable John W. Peck, U.S. Circuit Judge fo the Sixth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3085

DWAYNE JONATHAN HILJER, as personal representative of the Estate of Mary Gregg Hiljer, Deceased,

Plaintiff-Appellant,

versus

HARRY N. WALTERS, Administrator of Veterans Affairs,

Defendant-Appellee

Appeal from the
United States District Court
for the
Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion January 10, 1985, 11 Cir., 19__,__ F.2d____).

(Feb. 11, 1985)

Before GODBOLD, Chief Judge, FAY, Circuit Judge, and PECK*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

illegible /s/
United States Circuit Judge
John W. Peck, U. S. Circuit Judge for the Sixth Circuit,

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3085

D.C. Docket No. 82-00077

DWAYNE JONATHAN HILJER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY GREGG HILJER, DECEASED,

Plaintiff-Appellant,

versus

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS,

Defendant-Appellee

Appeal from the
United States District Court
for the
Middle District of Florida

Before GODBOLD, Chief Judge, FAY, Circuit Judge, and PECK*, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

*Honorable John W. Peck, U.S. Circuit Judge fo
the Sixth Circuit, sitting by designation.

Entered: January 10, 1985
For the Court: Spencer D. Mercer,
Clerk

By: illegible /s/
Deputy Clerk

ISSUED AS MANDATE: Feb. 21, 1985

UNITED STATES DISTRICT COURT
Middle District of Florida
TAMPA DIVISION

DWAYNE JONATHAN HILJER, as personal representative of the estate of Mary Gregg Hiljer, Deceased

Plaintiff-Appellant

Case No.
82-77-CIV-T-17

vs.

HARRY N. WALTERS, Administrator of Veterans Affairs,

U. S. COURT OF APPEALS ELEVENTH CIRCUIT NO.84-3085

DEFENDANT-APPELLEE,

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that DWAYNE JONATHAN HILJER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY GREGG HILJER, Deceased, the appellant above named, hereby appeals to the SUPREME COURT OF THE UNITED STATES from the Judgment of the UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, affirming the JUDGMENT of the District Court for the Middle District of Florida.

This appeal is taken pursuant, to 28 U.S.C. Ch.81.

FRANK M. BOSWORTH, JR., P.A.

By: Frank M. Bosworth, Jr. /s/

Attorney for Appellant
1518 Winfield Road W
Clearwater, FL 33516
Tel: (813) 442-6346

TO:
Clerk, District Court, Middle
District of Florida
Clerk, United States of Appeals,
Eleventh Circuit
David V. Seaman, Esq., U.S. Department
of Justice, Civil Division
Gary J. Takacs, Esq., AUSA, Tampa, Florida